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Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel

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Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel

Chairman: Mr. Christian **Wenaweser** (Liechtenstein)

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I. Introduction

1. The General Assembly, in its resolution 56/89 of 12 December 2001, decided to establish the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel to consider the recommendations made by the Secretary-General in his report on the measures to strengthen and enhance the protective legal regime for United Nations and associated personnel.[1] In accordance with paragraph 7 of the same resolution, membership on the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or the International Atomic Energy Agency (IAEA). The Ad Hoc Committee met from 1 to 5 April 2002, and presented a report to the General Assembly at its fifty-seventh session.[2]

2. Subsequently, the Ad Hoc Committee was reconvened, from 24 to 28 March 2003, pursuant to paragraph 8 of General Assembly resolution 57/28 of 19 November 2002, and continued the discussion on measures to enhance the existing protective legal regime for United Nations and associated personnel. The proceedings of the Ad Hoc Committee are summarized in its report to the General Assembly at its fifty-eighth session.[3]

3. During the fifty-eighth session of the General Assembly, following informal consultations, the Sixth Committee, at its 1st meeting, on 29 September 2003, established a Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel in order to continue the work of the Ad Hoc Committee. The Sixth Committee, at the same meeting, elected Christian Wenaweser (Liechtenstein) as the Chairman of the Working Group.

4. The Working Group held two meetings and a number of informal consultations from 13 to 17 October 2003. Because of the importance of the subject under consideration, the Working Group decided, at its first meeting, on 13 October 2003, to hold the formal meetings of the Working Group in open sessions.

5. The Working Group had before it the report of the last session of the Ad Hoc Committee[3] and the report of the Secretary-General,[4] prepared pursuant to the request by the General Assembly in its resolution 57/28, and taking into account the recommendations of the last session of the Ad Hoc Committee. The Working Group also had before it a letter dated 20 August 2003 from the Permanent Representative of Malaysia to the United Nations addressed to the Secretary-General.[5]

6. The Working Group considered and adopted its report at its 2nd meeting, on 17 October 2003.

II. Proceedings of the Working Group

7. The Working Group held a general exchange of views at its 1st meeting, on 13 October 2003. Discussions were subsequently held in informal consultations. An informal summary of the discussion in the Working Group, prepared by the Chairman, is set out in annex II to the present report. The summary is intended for reference purposes only, and not as an official record of the discussions.

III. Recommendations and conclusions

8. At its 2nd meeting, on 17 October, the Working Group decided to refer the present report to the Sixth Committee for its consideration and recommended that the Ad Hoc Committee established under General Assembly resolution 56/89 be reconvened with a mandate to expand the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, including, inter alia, by means of a legal instrument.

Notes

[1] A/55/637.

[2] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 52* (A/57/52).

[3] Ibid., *Fifty-eighth Session, Supplement No. 52* (A/58/52).

[4] A/58/187.

[5] A/58/302.

Annex I

Written amendments and proposals submitted by delegations

A. Proposal by Costa Rica

New article 1 bis

The Convention shall not apply to any United Nations operation in which any personnel are engaged as combatants against organized armed forces and to which the international law of armed conflict applies.

Explanatory note

As noted in footnote 3 of the report of the Secretary-General on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (A/55/637), "the exclusion from the scope of application of the Convention of Chapter VII United Nations operations carried out in situations of international armed conflict, gives rise to the suggestion that enforcement actions carried out in situations of internal armed conflict (UNOSOM II type of operations), are included within the scope of the Convention and subject to its protective regime". Consequently, there is a need to clearly delineate the scope of application of the mutually exclusive regimes of international humanitarian law and the protective regime of the Convention.

The proposed language seeks to reflect the opinion expressed by the Secretary-General in the above-mentioned report that "in the final analysis, it is not the nature of the conflict which should determine the applicability of international humanitarian law or that of the Convention, but whether in any type of conflict, members of United Nations peacekeeping operations are actively engaged therein as combatants or are otherwise entitled to the protection given to civilians under the international law of armed conflict".

B. Proposal by Jordan

1. Replace article 1 (c) of the Convention

"United Nations operation" means an operation or presence established pursuant to a standing or specific mandate of a competent organ of the United Nations consistent with the Charter of the United Nations and conducted under United Nations authority and control:

(a) Where the operation is for the purpose of maintaining or restoring international peace and security;

(b) Where the operation is conducted in situations of armed conflict;

(c) Where the host State does not or is unable to establish and exercise national jurisdiction over crimes against United Nations and associated personnel or take all appropriate measures to ensure the safety of such personnel; or

(d) Where the United Nations operation is not conducted in a host State.

Explanatory note

(a) Purpose

1. To extend the scope of application of the Convention to certain United Nations operations where the personnel participating in the operation are deployed in a dangerous or risky environment, which warrants the special protection regime of the Convention.

2. To dispose of the requirement of a declaration of exceptional risk as a trigger mechanism for the application of the Convention when such an operation is not for the purpose of maintaining and restoring international peace and security.

(b) To which operations is the scope of the Convention extended?

Only United Nations operations where the situation on the ground renders the personnel involved in the operation more vulnerable to attacks than in normal situations:

1. Peacekeeping operations.

2. Armed conflict: whether international or not of an international character.

3. Where national laws in a host State do not provide sufficient legal protection to United Nations and associated personnel. In this regard, it is not necessary for the host State to specifically incriminate the crimes provided for under article 9 of the Convention against United Nations and associated personnel. However, it would be necessary that the general rules of criminal law in the host State incriminate attacks of the same nature as those found under article 9.

4. The host State must also have the means to implement and enforce its legislation incriminating attacks. Accordingly, in certain situations, such as mutinies and the collapse of government or other situations where the government is not able to exercise its sovereign authority, the special regime of legal protection of the Convention shall be extended to the operation.

5. The same also applies where the host State is unwilling or unable to take measures to ensure the safety of United Nations and associated personnel from attacks. The norm/test to be applied is whether the State has the capacity to take measures to ensure the safety of individuals in its territory.

6. United Nations operations are not necessarily conducted in a host *State*. Such operations are by nature risky because of the lack of State/government institutions that can provide sufficient legal protection for United Nations and associated personnel.

2. New article (xx)

1. Notwithstanding articles 7, 8 and 9 of the Convention, where the provisions of the Convention are extended to a United Nations operation in accordance with article 1 (c), the host State or transit State may exercise national jurisdiction over any United Nations or associated personnel who violate the laws and regulations of that State, unless the host State or transit State is bound to refrain from doing so under other existing international obligations.

2. Any lawful action taken by the host or transit State in accordance with paragraph 1 above is not deemed to be a crime under the Convention or to prevent the discharge of the mandate of the United Nations operation.

Explanatory note

The purpose of this article is to allow the host and transit States to exercise national jurisdiction against those personnel who violate the laws on regulations of the State. By extending the scope of the Convention to operations other than those intended to restore international peace and security, the sovereign right of the host/transit State to exercise its authorities when its laws and regulations are being violated would be restricted. Except when this State is already bound by other international obligation, such as the 1946 Convention on the Privileges and Immunities of the United Nations, there is no reason to grant United Nations and associated personnel immunity from the national jurisdiction of that State. It should be noted that only the *State* can practice its national jurisdiction. Accordingly, entities and individuals in the host/transit State who have government authority to implement and enforce national laws can exercise such authorities vis-à-vis such personnel.

Annex II

Informal summary of the general discussion in the Working Group, prepared by the Chairman

General statements

1. Delegations condemned acts of violence against United Nations and associated personnel and paid tribute to the United Nations staff members who lost their lives, inter alia, in the 19 August 2003 attack in Baghdad.

2. Some speakers welcomed the report of the Secretary-General on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (A/58/187) and Security Council resolution 1502 (2003). With reference to the Secretary-General's report, concern was expressed that only in very few cases were the perpetrators of the acts of violence against United Nations and associated personnel brought to justice. In response, it was noted that the statistics provided by the Secretary-General in his report, as well as recent casualties, could not serve as evidence of the flaws in the existing legal regime of the protection of United Nations and associated personnel. In their view, in practice, no legal measures could ensure the safety of United Nations and associated personnel without appropriate measures being taken by host States and the Secretary-General. Some speakers called for the universal adherence to the 1994 Convention on the Safety of United Nations and Associated Personnel and the implementation of the short-term measures enumerated in General Assembly resolution 57/28 and Security Council resolution 1502 (2003). Other delegations, while also subscribing to the goal of universality of the Convention and the implementation of the short-term measures, reiterated their position that longer-term solutions were required to address the shortcoming of the existing protective legal regime of United Nations and associated personnel. The view was also expressed that "universality", in the context of the 1994 Convention, had two aspects: the universal ratification of the Convention as well as its universal application, for which the expansion of its scope was necessary. Some delegations expressed the view that it was very important to maintain the legal regime under the existing Convention when examining ways of expanding its scope of application.

Consideration of the proposal by New Zealand (A/AC.264/2003/DP.1) and amendment thereto by the European Union (A/AC.264/2003/DP.3)

3. Some delegations supported the New Zealand proposal (A/AC.264/2003/DP.1) and the amendment thereto by the European Union (A/AC.264/2003/DP.3). They called for the elimination of the requirement of declaration of exceptional risk and reiterated their position that the Convention should automatically apply to all operations under United Nations control and authority without distinction. The expansion of the protective legal regime to all United Nations operations and presences raised objections, in particular on the ground that such an expansion would make the existing legal regime even more imbalanced by placing a greater burden on host States.

4. A discussion of the usefulness of the term "operations" took place, which seemed problematic to a number of delegations. Specifically, delegations expressed their reservations regarding the definition of the term in paragraph 7 of the Secretary-General's report (A/55/637). Some delegations expressed their willingness to explore different options to give a more precise definition of United Nations operations to which an expanded legal regime would apply, in particular by reflecting therein the notion of risk, with a view to dispensing with the declaration of exceptional risk that had proven to be an obstacle in the practical application of the Convention. The point was made that only those United Nations operations that were inherently risky, such as political, peace-building and humanitarian operations, should be within the expanded scope of the protective regime. Some operations and presences, such as those established by headquarters agreements, should be excluded. Support was expressed for the identification of categories of missions to be covered by the expanded regime on the basis of the designation of operations rather than situations in which they existed. A suggestion was made that a list could also be elaborated containing United Nations operations intended to be excluded from the expanded scope of the Convention. Conversely, it was noted that any arbitrary lists or lists entailing politicization should be avoided. There was agreement that it was worth exploring a definition of the term "operations" that did not cover all United Nations operations and was sufficiently clear.

Proposal by Jordan

5. Some delegations welcomed the proposal by Jordan, which, in their view, contained innovative ideas that preserved State sovereignty, sought to fill the gaps found in the Convention and addressed the concerns that had heretofore hindered universal adherence to the Convention.

6. Other delegations, felt that the proposal was too restrictive in the light of the way in which the element of risk was retained, and expressed concern that it could even result in reducing the scope of application of the Convention. According to another view, the retention of the notion of risk could be considered, subject to the setting forth of a clear and objective threshold.

7. The point was made that the proposal sought to deal with specific "situations", yet these tended to be fluid, requiring constant reassessment and analysis of the new circumstances and making the application of the Convention difficult. Therefore, preference was expressed for following the approach of discussing the types of United Nations operations, wherein certain categories posed risk by virtue of their very nature, that would be covered by the enlargement of the scope of the Convention. In this connection, while favouring the extension of the scope of application to all United Nations operations, it was noted that discussions could proceed on a purpose-specific definition of United Nations operations.

8. However, the point was also made that assessment of risky situations by national institutions such as the judiciary for purposes of applying legal obligations is not something alien to international law enforcement instruments.

9. It was also stated that subparagraph (b) of the proposal might affect other provisions of the Convention that had been carefully crafted in order to avoid conflict with the provisions of the 1949 Geneva Conventions. In this connection, the view was also expressed that it was not necessarily easy to characterize a situation

as being one of armed conflict and that it was precisely in such "grey" areas where United Nations operations were more exposed to hazard.

10. With regard to subparagraph (c) of the proposal, the point was made that the determination of whether or not a State exercised or was unwilling to exercise its national jurisdiction over relevant crimes constituted a subjective assessment, which raised the issue of who would make such a determination, one fraught with political connotations. Other Contracting States might be wary of making such an assessment. In this connection, attention was drawn to article 22 of the Convention, providing for a mechanism for dispute settlements. Some delegations, however, expressed the view that this mechanism might be too cumbersome and too slow in practice. It was noted that specificity and precision were vital to a law enforcement instrument.

11. Some delegations raised questions about the meaning of subparagraph (d), which was intended to apply to situations where there was no central government that could establish or provide legal protection. In their view the Convention could apply only if there was a government, since the responsibility is imposed on the government. For this reason they found the proposed subparagraph in contradiction with article 10 of the Convention, requiring a State to establish jurisdiction over the crimes listed in the Convention.

12. On the other hand, it was pointed out that subparagraph (d) was consistent with article 10 since a State party may establish jurisdiction over crimes committed outside its territory.

13. Some delegations expressed support for the proposed new article (xx) on the grounds that it would promote the universality of the Convention by eliminating a major obstacle to the adherence of some States. While supporting the spirit and intent of the article, the view was expressed that an exception should be made as regards personnel engaged in peacekeeping operations, with respect to whom the contributing State should exercise jurisdiction, unless unwilling to do so. In such cases, upon a decision by the Security Council, the host State would be able to exercise its jurisdiction. It was suggested that the proposed article appear as a separate article without any link to articles 7, 8 or 9 of the Convention, whose language should be preserved.

Form of the document to be elaborated

14. The Working Group considered the following options with regard to the form of the document to be elaborated on the scope of the 1994 Convention: (a) additional protocol; (b) optional protocol; (c) amendment to the 1994 Convention; (d) stand-alone protocol. It was generally agreed that setting up a new legal regime should not disturb the existing legal regime under the 1994 Convention. Therefore, several delegations expressed their preference for drafting a separate stand-alone document or an optional protocol. An optional protocol was preferable for some delegations because it would preserve the integrity of the existing legal regime while allowing States to take on additional obligations if they so wished. It was also pointed out that the creation of competing legal regimes had to be avoided. A view was expressed that certain provisions of the 1994 Convention may need to be reviewed if its scope is expanded. Yet a further opinion was expressed that the Convention had some problems that could be eliminated only by amending it. A

number of delegations rejected the idea of an amendment to the Convention and were generally favourable to the idea of drafting a protocol, while reserving their position on the eventual relationship between the protocol and the Convention until its content had been worked out. It was agreed that any modification to the Convention should be in the form of a protocol, while several delegations made it clear that their position on what type of protocol they would prefer was dependent on the actual contents of such a protocol.

Proposal by Costa Rica

15. In introducing the proposal, the sponsor noted that the protective legal regimes under the Convention and international humanitarian law were mutually exclusive. The 1994 Convention had, however, created an overlap between them. The proposal was introduced for discussion at a later stage.